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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/066,057

01/31/2002

Michael B. Zemel

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07/24/2009

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EXAMINER

FISHER, ABIGAIL L

ART UNIT

PAPER NUMBER

1616

MAIL DATE

DELIVERY MODE

07/24/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/066,057	Applicant(s) ZEMEL ET AL.	
	Examiner ABIGAIL FISHER	Art Unit 1616	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 14 July 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
- Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on July 14 2009. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☒ They raise the issue of new matter (see NOTE below);
- (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☒ Applicant's reply has overcome the following rejection(s): See Continuation Sheet.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: _____.
- Claim(s) objected to: _____.
- Claim(s) rejected: 1,5-6, 28-37, 41-44, 46-53, 55, 57, 59-62, 64-72.
- Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☒ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). 4/13/09
13. ☐ Other: _____.

/Mina Haghighatian/
Primary Examiner, Art Unit 1616

Continuation of 3. NOTE: Applicants have amended claim 1 which changes the scope of the claims. Additionally, the amendments raise the issue of new matter as Applicants indicate that support can be found on page 9, however the recitation of 1900 kcal is not present. Therefore, the lower limit recited is deemed new matter.

Continuation of 5. Applicant's reply has overcome the following rejection(s): Rejection of claims 52, 64, 67 and 72 under 35 USC 112, first paragraph as failing to comply with the written description requirement. Rejection of claims 1, 5-6, 28-37, 41-44, 46-53, 55, 57, 59-62, 64-72 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 21, 23-24, 35-38, 41, 50, 55-58, 61-63 and 78-79 of copending Application No. 10017568 in view of Science Daily and McCarty et al. The terminal disclaimer filed on July 10 2009 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of any Patent granted on Application No. 10017568 has been reviewed and is accepted. The terminal disclaimer has been recorded.

Continuation of 11. does NOT place the application in condition for allowance because: The rejections are maintained for the reasons provided in the final Office action. Applicants argue that the Science Daily article indicates that there is no effect in patients who consume more than 1900 kcal. Regarding this argument, just as the instant applicants indicate that there is a tipping point in terms of kcal consumption so does Science Daily. The combination of Science Daily and Summerbell et al. would teach to one of ordinary skill in the art that administration of calcium to obese individuals would cause a reduction in weight. Additionally as taught by McCarty et al. dietary recommendations for overweight individuals attempting to loose weight and fat is dependent on body size and that average recommended intake is about 2000 kcal. Therefore, it would have been obvious to one of ordinary skill in the art to manipulate the caloric intake depending on the starting weight of the individual. Applicants argue that a person of ordinary skill would not draw any conclusions from Science Daily for its purported teachings. The examiner respectfully disagrees. Science Daily specifically state that women who consumed an average of 1000 mg of calcium showed an overall decrease in body weight as high as six to seven pounds. This is a specific teaching that calcium has an effect on weight loss. While Science Daily does not specifically state how calcium works to cause weight loss, it clearly indicates that administration of calcium causes the weight loss. How it works is inherent to the calcium. Applicants argue that based upon Summerbell, one of ordinary skill in the art could not determine if the weight loss is due to milk, compliance or energy deficit. Regarding this argument, the instant rejection is made under 35 USC 103 utilizing a combination of Science Daily and Summerbell. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). The combination of the two references would suggest to one of ordinary skill in the art that administration of calcium to both normal and overweight individuals would lead to weight loss.